IP 00-1718-C T/K Hamilton v. State Farm [2]
Judge John D. Tinder Signed on 3/13/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HAMILTON, PAULA, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, INCORRECTLY NAMED AS STATE FARM INSURANCE COMPANY, Defendant.	)	CAUSE NO. IP00-1718-C-T/?

π Jeffrey Allen Cooke
The Cooke Law Office
331 Columbia St
P.O. Box 188
Lafayette, IN 47902-0188

π Timothy A Rowe
Rowe and Hamilton
600 Victoria Centre
22 East Washington Street
Indianapolis, IN 46204

Dennis F Cantrell
Bingham Summers Welsh & Spilman
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PAULA HAMILTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 00-1718-C-T/K
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

Defendant filed a Motion for Partial Summary Judgment. Plaintiff opposes the Motion. This court now **GRANTS** Defendant's Motion.

I. Factual Background[2]

[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion to be sufficiently novel or instructive to justify commercial publication of the Entry or the subsequent citation of it in other proceedings.

[2] These facts are not disputed. Additional facts may be set forth in the discussion sections as necessary. Those sections also will address various disputes about factual submissions proffered by Hamilton.

On September 24, 1999, Paula Hamilton was in a traffic accident. At the time of the accident, Hamilton's vehicle was insured by State Farm Mutual Automobile Insurance Company ("State Farm"). Her policy provided that State Farm would pay reasonable medical expenses within three years of the accident for up to $10,000. The policy also provided that State Farm has "the right to make or obtain utilization review of the medical expenses and services to determine if they are reasonable and necessary for the bodily injury sustained." This procedure is specifically authorized under the Indiana Code. Ind. Code § § 27-8-16-0.5 to 14 (1998).

Jennifer Blissitt was assigned to Hamilton's case as the State Farm Claims Specialist. On October 21, 1999, Blissitt wrote Hamilton informing her of the $10,000 limit on her policy and the possibility of utilization review. Although State Farm paid over $3,000 of Hamilton's medical expenses, State Farm decided to evaluate Hamilton's continued claims for treatment to her lower back. On March 23, 2000, Blissitt wrote Hamilton to inform her that State Farm was evaluating her claim to see if all of the medical charges were reasonable and necessary. On March 30, Blissitt retained ASU Group to perform the utilization review of Hamilton's medical records. On July 25, Dr. David Cox, a chiropractor retained by ASU, reported that he could not establish Hamilton's reported diagnosis or a causal connection between the September 24, 1999 accident and any current back injury. On August 17, Blissitt wrote Hamilton to inform her that State Farm was denying the rest of her claim because the utilization review found no causal connection

between her injury and the car accident. Hamilton was also informed that she could bring any dispute with State Farm through arbitration.

On October 2, 2000, Hamilton filed suit against State Farm alleging breach of contract, intentional infliction of emotional distress, and breach of the insurer's duty of good faith and fair dealing and seeking punitive as well as compensatory damages. On July 5, 2001, Defendant filed this Motion for Partial Summary Judgment. Plaintiff opposes the Motion. The court now rules as follows.

II. Summary Judgment Standard

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The motion should be granted only if no reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the party opposing the motion bears the burden of proof at trial on an issue, that party can avoid summary judgment only by setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). When ruling on a motion for summary judgment, the court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *Anderson*, 477 U.S. at 255. Speculation, however, is not

the source of a reasonable inference. *See Chmiel v. JC Penney Life Ins. Co.*, 158 F.3d 966, 968 (7th Cir. 1998) (noting that the court is not required to draw every conceivable inference from the record in favor of the non-movant, but only those inferences that are reasonable).

III. Breach of Good Faith and Fair Dealing

Defendant first contends that its denial of Plaintiff's claim for medical payments did not constitute a breach of its duty of good faith and fair dealing. The duty to act in good faith is often called the tort of bad faith and is based on the implied duty of good faith and fair dealing owed by an insurer to its insured. The tort of bad faith was first recognized by the Indiana Supreme Court in *Erie Insurance Co. v. Hickman,* 622 N.E.2d 515 (Ind. 1993). The court observed that

> The obligation of good faith and fair dealing with respect to the discharge of the insurer's contractual obligation includes the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.

Id. at 519. The tort is not available every time an insurance company fails to pay a claim. The insurer is allowed to contest the validity of a claim or its amount in good faith. However, "an insurer which denies liability knowing that there is no rational, principled basis for doing so has breached its duty." *Id.* at 520.

With these principles in mind, this court turns to the present case. State Farm initially paid Plaintiff's medical bills, but later questioned coverage for a lower back injury. As is allowed under the State Farm policy, Blissitt sent Plaintiff's records to an outside vendor, ASU Group. ASU reviewed Plaintiff's records and found no causal link between the back treatments and Plaintiff's car accident. In reliance on this review, State Farm stopped paying Plaintiff's medical bills. As a general matter, it appears that it can hardly be called bad faith to follow a procedure provided for in the insurance policy, particularly where there is a state statute allowing such procedures. Ind. Code § § 27-8-16-0.5 to 14 (1998).

In support of its theory that State Farm violated the duty of good faith, Plaintiff presents the affidavits of Ron Hoover and James Mathis to illustrate the "improper and legally sanctionable State Farm insured med-pay claim review process." (Pl.'s Br. in Resp. at 2-3.) Hoover was a thirty-one-year State Farm employee, employed in Illinois until January 1999. Hoover's affidavit claims that State Farm's outside review system was adopted to reduce State Farm's payouts. Specifically, Hoover contends that decision to use outside records review vendors was made to reduce and deny insureds' medical claims, that he can remember no instance where a reviewer determined that all expenses were reasonable and necessary, and that State Farm employees' performance evaluations were based on the ability to reduce payments to insureds. Rule 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the

affiant is competent to testify to the matters stated therein." Hoover's affidavit is inadmissible for several reasons. First, it is conclusory. *See* ¶ 3 ("State Farm corporate adopted the use of outside records review vendors . . . to provide me and other claims representatives with documentation to reduce or deny State Farm corporate insureds' first-party medical payments claims."). Also, the affidavit is not based on personal knowledge and lacks relevance to the current litigation. Hoover has no knowledge of Hamilton's claim. In fact, Hoover was not even employed with State Farm during the time of Hamilton's dispute with State Farm and does not appear to have ever done work in Indiana. Any knowledge Hoover has about State Farm would be limited to the Illinois offices where he worked. What occurred in those offices is not necessarily the same as in the Indiana office where Hamilton presented her claim.

Mathis' affidavits fail for similar reasons. As a preliminary matter, this court notes that the Mathis affidavits presented by Plaintiff appear to have been prepared for two other litigations. Mathis was employed with State Farm from January 1987 until November 1994. His affidavit discusses cost-saving mechanisms at State Farm, incentive programs based on reduced payouts, and the merits of the other lawsuits. Hamilton relies on Mathis' statement that:

> Independent Medical Examinations and Paper Reviews were two additional tools expressly encouraged to be used in order to reduce the average paid amount of first and thirty-party claims. . . . . If State Farm did not realize a significant reduction of billed amounts for treatment provided to insureds or a significant percentage of the ongoing treatment cutoffs recommended by a vendor, the field offices would be directed to discontinue use of that vendor.

(Mathis Aff. Ex. M, ¶ 8.) The first part of this statement is conclusory. Also, Mathis has no personal information about the claims in this case or the ASU Group. Furthermore, Mathis has no experience with State Farm's operations in Indiana. Finally, Mathis has not worked at State Farm since 1994, almost five years before the Plaintiff's accident. This is simply insufficient to constitute personal knowledge of State Farm's actions in the current case. *See Visser v. Packer Eng'g Assocs., Inc.,* 924 F.2d 655, 659 (7th Cir. 1991) (Although personal knowledge includes inferences and opinions, "the inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.").

Plaintiff also relies on fact that State Farm paid ASU to review claims.[3] This hardly establishes bad faith in the review system seeing as how that is what the review system entailed. It seems unlikely that ASU would perform the review for free and there also does not appear to be another likely source to pay ASU.

Plaintiff relies on her own deposition in which she relayed statements that her agent told her the claims adjuster, Blissitt, had made. These consisted of statements that Plaintiff "knew how the game was played" and that Plaintiff's claims were fraudulent.

---

[3]Plaintiff further contends that discovery is not completed and implies that more evidence will be found during the discovery process. Rule 56(f) provides for a procedure by which the parties can obtain additional discovery that is necessary for the summary judgment proceeding. Plaintiff here has failed to do so and cannot now make claims about evidence that may be found at a later date.

Although these statements may be hearsay, they appear to be admissible under Federal Rule of Evidence 801(d)(2)(D), allowing admission of statements by party-opponents and their employees or agents. However, even if they are admissible, the statements do not establish anything for the Plaintiff. Instead these statements belie her claim of bad faith because if the adjuster believed that Plaintiff was lying, then the denial of coverage would not be in bad faith.

The majority of Plaintiff's support for her claim is judgments and rulings in other cases against State Farm. The argument appears to be that State Farm is bad and therefore must be bad in this case. This is an impermissible inference under the Federal Rules of Evidence and case law. Fed. R. Evid. 404; *White v. State Farm Mut. Auto. Ins. Co.,* 709 N.E.2d 1079, 1084 (Ind. Ct. App. 1999); *Van Bree v. Harrison County,* 584 N.E.2d 1114, 1120-21 (Ind. Ct. App. 1992). Even if this were allowable, the cases relied upon by Plaintiff are not similar enough to the current case to be relevant. The Plaintiff relies on three cases: *Campbell v. State Farm Mutual Automobile Insurance Co.*, 840 P.2d 130, 133 (Utah Ct. App. 1992), *on appeal after remand* No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), *Robinson v. State Farm Mutual Automobile Insurance Co.*, No. 24952, 2000 WL 1877745 (Idaho Dec. 28, 2000), *Zilisch v. State Farm Mutual Automobile Insurance Co.*, 995 P.2d 276, 278 (Ariz. 2000). *Campbell* involved a wrongful death claim, *Robinson* involved a med pay claim with an different utilization review firm in a state with no medical review claims statute, and *Zilisch* involved an uninsured motorist claim in Arizona. These cases are not similar enough to the current

case to be relevant. Because Plaintiff has not presented sufficient evidence to establish a claim for bad faith, summary judgment must be granted for the Defendant.

IV. Intentional Infliction of Emotional Distress

Defendant also contends that the undisputed facts do not establish a claim for intentional infliction of emotional distress. The tort of intentional infliction of emotional distress was first recognized by the Indiana Supreme Court in *Cullison v. Medley,* 570 N.E.2d 27 (Ind. 1991). The court stated that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." *Id.* at 31 (citations omitted). Conduct will satisfy this requirement:

> only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

Gable v. Curtis, 673 N.E.2d 805, 809-10 (Ind. Ct. App. 1996) (quoting the Comments to Restatement (Second) of Torts § 46 (1965)).

The tort is also referred to as the tort of outrage. *Doe v. Methodist Hosp.,* 690 N.E.2d 681, 691 (Ind. 1997). The tort contains "stringent" proof requirements: "To establish liability for outrage, a plaintiff must prove that a defendant (1) engaged in 'extreme and outrageous' conduct that (2) intentionally or recklessly (3) caused (4) severe emotional distress." *Id.* (citations omitted).

In *Cullison*, the Indiana Supreme Court held that although the tort may be appropriate "under proper circumstances," under the facts of that case, in which the defendants had broken into the plaintiff's home, yelled angrily at him, and threatened him with a gun (knowing, the plaintiff alleged, that he had a fear of guns), the court nevertheless upheld the entry of summary judgment in favor of the defendants on that claim. *Cullison,* 570 N.E.2d at 31. Using *Cullison* as a guide, Indiana courts have been very reluctant to recognize the tort of intentional infliction of emotional distress, and in fact, the Indiana Supreme Court has never been faced with a set of facts that states a claim for intentional infliction of emotional distress.

In this case, Plaintiff accused State Farm of intentionally causing emotional distress with its unreasonable delay and failure to pay Plaintiff's medical bills pursuant to her insurance policy and its implication "that Plaintiff Paula Hamilton is exaggerating or presenting a fraudulent claim." (Compl. ¶ 10.) Even if this is true, it simply does not rise to the level of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly

intolerable in a civilized community." The action here of not paying an insurance claim is clearly less extreme than breaking into someone's house and threatening them with a gun as in *Cullison*. Plaintiff relies on *Patel v. United Fire and Casualty Co.,* 80 F. Supp. 2d 948 (N.D. Ind. 2000), which held that the plaintiff could recover emotional damages under the tort of bad faith. Without ruling on the correctness of that conclusion, this court concludes that the issue presented in *Patel* is not before the court. The *Patel* court determined that damages for emotional distress may be part of the recovery under the tort of bad faith. In this case, the Plaintiff has presented sufficient evidence to establish neither the tort of bad faith, as discussed above, or the independent tort of intentional infliction of emotional distress.

IV. Punitive Damages

Finally, Defendant contends that its denial of Plaintiff's claim does not give rise to a claim for punitive damages. Punitive damages in Indiana are allowable only if there is clear and convincing evidence that a defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failings. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 520 (Ind. 1993). Plaintiff makes a one paragraph argument in support of her punitive damage claim that:

> Indiana law concerning the clear and convincing evidence that State Farm acted with malice, fraud, gross negligence, or oppressiveness is present in the facts of the Hamilton first-party med-pay case as plead and as found in the documents tendered to the Court. There is sufficient genuine material

> factual evidence of the lack of good faith and fair dealing by State Farm with its insured Hamilton, in an orchestrated corporate fashion, to sustain a finding that State Farm should be punitively responsible to Hamilton for its bad faith actions in its dealings with insured Hamilton.

(Pl.'s Br. in Resp. at 13.) As discussed above, the majority of Plaintiff's evidentiary submissions are inadmissible because they are conclusory, hearsay, or based on a lack of personal knowledge. Also as discussed above, the Plaintiff has not presented sufficient facts to establish a claim for a breach of the tort of good faith and fair dealing. Finally, the Plaintiff has failed to present any evidence to show that Defendant acted with malice required to make it liable for an award of punitive damages.

VI. Conclusion

For the foregoing reasons, Defendant's Motion for Partial Summary Judgment will be **GRANTED.** Judgment will be entered in favor of the Defendant on the claims for breach of the duty of good faith, intentional infliction of emotional distress, and punitive damages. Because of the pendency of the breach of contract claim, a final judgment will not be entered until a disposition is reached on that claim as well. The claims are intertwined and the potential for multiple appeals from the same case can be avoided by withholding final judgment until all claims are resolved. A telephone conference will be held to schedule the trial on the remaining breach of contract claim.

ALL OF WHICH IS ORDERED this 13th day of March 2002.

John Daniel Tinder, Judge
United States District Court

Copies to:

Jeffrey Allen Cooke
The Cooke Law Office
331 Columbia St
P.O. Box 188
Lafayette, IN 47902-0188

Timothy A. Rowe
Rowe and Hamilton
600 Victoria Centre
22 East Washington Street
Indianapolis, IN 46204

Dennis F. Cantrell
Bingham Summers Welsh & Spilman
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204